

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 03-13147
Chapter 7

LOWRY HOLDEN JONES

Debtor

DEBORAH GONYER, DONALD
TANGWALL, and JAMES NEAL

Plaintiffs

v

Adversary Proceeding
No. 03-1129

LOWRY HOLDEN JONES

Defendant

MEMORANDUM AND ORDER

This adversary proceeding was commenced by Deborah Gonyer, Donald Tangwall, and James Neal ("Plaintiffs") to determine the dischargeability of a judgment obtained by Deborah Gonyer against Lowry Holden Jones. The complaint alleged fraud as the basis for the court to determine that this judgment is nondischargeable.¹

On August 22, 2003, the court entered an Order and Notice of Trial in which the court ordered, "A response to a dispositive motion must be filed within twenty (20) days after the

¹The complaint alleges:

...

3. The plaintiff entered into a contract with defendant Larry Jones/Tellico Builders on 4/11/00. See attached exhibit A.

4. At the time of entering the contract the defendant at all times represented that he was a licensed builder.

5. After the defendant breached the contract with the plaintiff, Deborah Gonyer, the plaintiff on her own industry discovered the defendant was not during the period of the contract a licensed builder.

...

date of the motion was filed. Any opposing response shall be supported by a brief setting forth the facts and the law in opposition to the motion. After the time for response has expired, the court may rule on the motion without further notice and without a hearing.”

On August 26, 2003, the debtor filed a motion for summary judgment supported by an affidavit of the debtor. Pursuant to the court’s scheduling order, a response was due on or before September 15, 2003. No reply has been filed.

Upon review of the complaint, the answer, and the motion for summary judgment, the court finds that the motion should be granted for the reasons set forth in the motion. Pursuant to Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding through Fed. R. Bankr. P. 7056, summary judgment is available when a party is entitled to a judgment as a matter of law and when, after consideration of the evidence presented by the pleadings and affidavits in a light most favorable to the nonmoving party, there remain no genuine issues of material fact. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The factual dispute must be genuine. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

The moving party must inform the court of the basis of its motion and clearly and convincingly demonstrate “the absence of any genuine issues of material fact.” *Sims v. Memphis Processors, Inc.*, 926 F.2d 524, 526 (6th Cir. 1991). If this initial burden is met, the nonmoving party is required to defeat the summary judgment motion by presenting “‘significant probative evidence,’ showing that genuine, material factual disputes remain.” *Id.* (citation omitted) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986)). The nonmoving party will not be allowed to rely on the mere allegations of its pleadings or “on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact.” *Street*, 886 F.2d at 1479. Rather, it must “go

beyond the pleadings and by its own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986) (quoting Fed R. Civ. P. 56(c), (e)).

The Supreme Court has held that proof of fraudulent conduct justifying a finding of nondischargeability must be based on the common law tort definition of fraud, and that definition is applicable whether fraud, false pretenses, or false representations are claimed. *Field v. Mans*, 516 U.S. 59, 116 S. Ct. 437, 133 L.Ed. 2d. 351 (1995). The common law elements in the context of this case are as follows:

1. The debtor made representations. At the time made the debtor knew the representations were false.
2. The false representations were made by the debtor with the intention or purpose of deceiving the plaintiff.
3. The plaintiff justifiably relied on the false statements made by the debtor.
4. The plaintiff/creditor sustained loss and damages as the proximate result of the false statements being made by the debtor.

To prevail and obtain a judgment of nondischargeability, plaintiff must prove each of these elements by a preponderance of the evidence. *Grogan v. Garner*, 489 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 755 (1991).

Further, all exceptions to discharge of the debtor should be strictly and narrowly construed in favor of the debtor. *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988); *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986), both citing *Gleason v. Fall*, 236 U.S. 558, 35 S.Ct. 287, 59 L.Ed. 717 (1915).

The unrefuted Affidavit of the debtor states that he denies he represented to Deborah Gonyer that he was a contractor licensed by the State of Tennessee; that she knew before the contract was undertaken that he held a license only from Monroe County, Tennessee;

and that she signed a "Release of Liability of Non State Licensed Contractor" which was submitted with the Affidavit.

Based on this evidence, the plaintiff has failed to establish that any misrepresentation was made. Accordingly,

It is ORDERED that the complaint is DISMISSED.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 9/19/03)